



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

April 28, 1995

Mr. Randel B. Gibbs  
Law Offices of Earl Luna, P.C.  
4411 Central Building  
4411 N. Central Expressway  
Dallas, Texas 75205

OR95-240

Dear Mr. Gibbs:

As counsel for the Denton Central Appraisal District (the "appraisal district"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 30749.

The appraisal district has received a letter, which you say you construe to be a request to copy the appraisal district's computer backup tapes with the requestor's own equipment. You inform us that the backup data contains proprietary software programming information licensed to the appraisal district. You state that the appraisal district has offered to provide copies of the backup data with the proprietary software information deleted, but the requestor has not accepted this offer. You ask whether the appraisal district may deny the request to copy its backup tapes based on sections 552.101, 552.104, and 552.110 of the Government Code.

Since the property and privacy rights of two software companies are implicated by the release of the requested information, this office notified those companies of this request. See Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances). One company, V Mark Software, Inc. ("V Mark"), did not respond to our notification. However, you enclosed a copy of an agreement between the city and V Mark in which the city agreed to be liable for all loss or damage to V Mark from any unauthorized disclosure of V Mark's proprietary data to any other party. The agreement also states that V Mark retains all proprietary rights to its property.

The other company, The Software Group Inc. ("Software"), asserts that its software on the backup tapes is proprietary and should be excepted from disclosure because the release of the backup tape would violate the license and copyright provisions of the agreement. Software also entered into a software license agreement with the appraisal district. That agreement states that the appraisal district "shall not, under any circumstance, modify, copy, reproduce, or in anyway duplicate any written or machine-readable material provided it by [the software company], without the express written approval signed by an officer of the [software company]."

You assert that sections 552.101, 552.104 and 552.110 of the Government Code apply to prevent the requestor from copying the "proprietary software information" on the tapes. Generally, a governmental body has the burden of proving that an exception applies to records requested from it. *See* Open Records Decision No. 532 (1989). You do not explain why these exceptions apply.

We begin by disposing of your section 552.104 claim. Section 552.104 is not applicable to protect the proprietary interests of a third party. *See* Open Records Decision No. 592 (1991).

Section 552.101 excepts from required public disclosure information that is confidential by law, either constitutional, statutory, or by judicial decision. You seem unclear about what information is at issue. A governmental body must ask for clarification if it cannot understand a request. *See* Open Records Decision No. 304 (1982). You suggest that the requested backup tapes may contain information from rendition statements that is confidential under section 22.27(a) of the Tax Code or copyrighted information when you state:

to the extent that the request can be construed as requesting information in rendition statements or obtained from copyrighted MLS sources, [the appraisal district] asks for your opinion that data banks containing such information need not be available to the requestor for copying on his own equipment.

You cite Open Records Letter No. 94-837 (1994), which determined that the Collin County Central Appraisal District must not permit the requestor to copy its backup tapes, since to do so would give the requestor access to information that is confidential under section 22.27(a) of the Tax Code. The Collin County Central Appraisal District had informed this office of the contents of its backup tapes so that we could determine whether the tapes contained confidential information.

We do not have the appraisal district's backup tapes. You have not informed us of the tapes' contents; you apparently lack the information to determine whether the requested tapes contain confidential information. We, too, lack the necessary information to determine whether the tapes contain confidential information. Thus, we cannot conclude that the tapes contain information that is excepted from required public

disclosure based on section 552.101 of the Government Code. If the tapes do in fact contain information that is confidential under section 22.27(a) of the Tax Code, the appraisal district may not permit the requestor to copy the back-up tapes, since in doing so the requestor would have access to confidential information. *See* Open Records Letter No. 94-837 (1994).<sup>1</sup>

We consider the effect of the city's agreements with V Mark and with Software. Governmental bodies may not withhold information from required public disclosure pursuant to an agreement to keep information confidential except where specifically authorized to do so by statute. *See* Open Records Decision No. 444 (1986). We are not aware of any statute that authorizes the appraisal district to enter into these agreements. We, therefore, conclude that as a basis for withholding information requested under this Open Records Act, the agreements are ineffective.

Finally, you raise section 552.110 of the Government Code. Section 552.110 excepts from required public disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision . . . ." The branch of section 552.110 covering "commercial or financial information" is inapplicable. *See* Open Records Decision No. 592 (1991). You do not assert that the software programs are trade secrets.<sup>2</sup> The software companies whose programs are on the tapes have not asserted that the programs are trade secrets. We conclude that the software information is not excepted from required public disclosure based on section 552.110.

In summary, we cannot find that the software information on the tapes is excepted from required public disclosure under sections 552.101, 552.104, or 552.110 of the Government Code. We note, however, that you suggest that the tapes may contain copyrighted information. Copyrighted information may be open to public inspection, but the custodian of records is not required to furnish copies of such information. *See* Attorney General Opinion JM-672 (1987). Members of the public who copy such information assume the duty of compliance with the copyright law and the risk of a copyright infringement suit. *See* Open Records Decision No. 550 (1990).

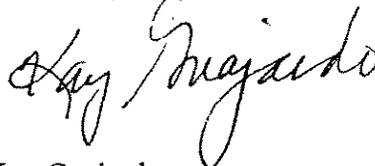
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<sup>1</sup>We caution that the Open Records Act provides for criminal penalties for the distribution of confidential information. *See* Gov't Code § 552.352. The Open Records Act also provides for criminal penalties for failure to provide access to, or to permit or provide copying of, requested public information. *See id.* § 552.353.

<sup>2</sup>The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958); RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision No. 552 (1990) at 2. The Restatement also lists six factors to be considered in determining whether particular information constitutes a trade secret. In making trade secret determinations for purposes of applying section 552.110, this office considers the facts presented by the third party involved or by the governmental body, in light of the Supreme Court's trade secret definition and the Restatement's six trade secret factors. *See* Open Records Decision No. 552 (1990).

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Kay Guajardo". The signature is written in a cursive style with a large, looped "K" and "G".

Kay Guajardo  
Assistant Attorney General  
Open Government Section

KHG/rho

Ref.: ID# 30749

Enclosures: Submitted documents

cc: Mr. Al Brewster  
Realty Data Processing, Inc.  
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(w/o enclosures)